Commonwealth of Kentucky
Supreme Court of Kentucky
2015-SC-000256-D

Kentucky Occupational Safety and Health Review Commission — Appellant

v

On Appeal From Court Of Appeals
2013-CA-001501

Secretary of Labor
Commonwealth of Kentucky

and

Franklin Circuit Court
2012-CI-00962

Estill County Fiscal Court — Appellees

BRIEF OF APPELLANT KENTUCKY OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Respectfully submitted,

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Certificate of Service

I certify that a copy of this brief has been served by first class mail this 5th day of February, 2016 on David Shattuck, Office of General Counsel, Kentucky Labor Cabinet, 1047 US Highway 127 South, Suite 2, Frankfort, Kentucky 40601; Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40601; D. Barry Stilz, Adrain M. Mendiondo, Kinkead & Stilz, 301 E. Main Street, Suite 800, Lexington, Kentucky, 40507; Rodney G. Davis, 200 Main Street, P. O. Box 150, Irvine, Kentucky 40336; Judge Thomas Wingate, Franklin Circuit Court, 222 St. Clair Street, Frankfort, Kentucky, 40601. I certify that I did not withdraw the record on appeal.

Frederick G. Huggins

Introduction

This is an administrative appeal from a recommended order entered by our hearing officer in an occupational safety and health discrimination case. Our hearing officer affirmed the discrimination citation; Franklin Circuit Court affirmed the hearing officer's order. The Kentucky Court of Appeals reversed Franklin circuit's opinion.

Statement Concerning Oral Argument

This case calls for oral argument. The court of appeals' published opinion in this case is in conflict with an opinion it previously issued: *Terminix International, Inc v Secretary of Labor*, Ky App, 92 SW3d 743 (2002).

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Statement of the Case

Mary Smith, formerly an employee at Estill County's sheriff dispatch office, had complained by letter to the county judge executive about smoke in her work place, smoke which caused her to have surgery on her sinuses. Rather than ban smoking in the dispatch office, the county judge removed Ms. Smith from the work schedule. When the county built a new dispatch office, one with a no smoking rule, it declined to call Ms. Smith back to work. After an investigation the Labor Cabinet issued an occupational safety and health citation to Estill County. In its citation the Labor Cabinet found Estill County's failure to call Ms. Smith back to work to be evidence of discrimination, a violation of KRS 338.121 (3) (a) which says:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or herself or others of any right afforded by this chapter...
>
> (emphasis added)

According to the citation, Ms. Smith's complaint to her employer was a protected activity.

The Review Commission's hearing officer, after a trial, sided with the Cabinet and concluded Ms. Smith's complaint was a protected activity; Hearing Officer Cobb interpreted the discrimination statute to include employee complaints to employers. Mr. Cobb ordered Ms. Smith back to work

and awarded back pay. Appendix 2, page 12. Franklin Circuit Court, interpreting the statute to provide protection to Ms. Smith, affirmed the hearing officer's recommended order. Appendix 3.

In its February 27, 2015 opinion, the Kentucky Court of Appeals reversed Franklin Circuit Court; this had the practical effect of reversing the review commission's hearing officer who had sustained[1] the discrimination citation issued by the Kentucky Labor Cabinet against Estill County. In its opinion the court of appeals found the hearing officer "impermissibly engaged in policy-making by relying on a federal regulation, 29 CFR 1977.9," to interpret the discrimination statute to include employee complaints to employers. Federal regulation 29 CFR 1977.9 (c), as the court observed, "has not been adopted by the [Kentucky Standards] Board."[2] Appendix 4, page 14.

29 CFR 1977.9 (c) is a federal interpretive regulation which interprets the federal discrimination statute, 29 USC 660 (c) (1).[3] In 1977.9 (c) the federal secretary finds an employee's complaint to her employer about safety and health is a protected activity under the federal occupational safety and health act.

In its February 27 opinion our court of appeals, in error, held the only way for the this commission, or the Labor Cabinet, to find an employee complaint

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[1] KRS 338.081 (3).

[2] KRS 338.051 creates a standards board which is responsible for adopting and promulgating "occupational safety and health rules, regulations, and standards..."

[3] Kentucky's equivalent is KRS 338.121 (3) (a), a statute which prohibits discrimination against an employee who has "filed any complaint" about safety and health. The two statutes, state and federal, are identical.

to her employer was a protected activity was for the standards board to enact its own version of 29 CFR 1977.9 (c) – or to adopt 1977.9 (c). Appendix 4, pages 7 and 14. As we shall explain, this narrow reading of the law is incorrect. The simple, statutory phrase, "filed any complaint," protects employees who have complained to their employers about safety and health. KRS 338.121 (3) (a) (emphasis added). The essential issue in this case is whether an employee's complaint about safety and health to her employer is a protected activity according to Kentucky's discrimination statute, KRS 338.121 (3) (a).

The Court of Appeals *Estill County* opinion ignores its own 2002 published opinion which has previously held an employee's mother's complaint, on behalf of her son to her son's employer, is a protected activity according to the Kentucky OSHA discrimination statute. *Terminix, supra. Terminix* does not reply on 29 CFR 1977.9 (c) but is instead based on the court's interpretation of Kentucky's discrimination statute applied to the facts of the case. KRS 338.121 (3) (a).

As we shall demonstrate, a substantial majority of federal circuits have held a Fair Labor Standards Act (FLSA) discrimination statute which states an employee who "files any complaint" about a wage and hour matter with his employer is engaging in a protected activity. This "files any[4] complaint" language is found in Kentucky's OSHA discrimination statute, KRS 338.121

[4] When used in a statute, the word "any" has been described as an "expansive adjective." *Pearce v University of Louisville*, Ky, 448 SW3d 746, 757 (2014).

(3) (a), and the federal discrimination act, 29 USC 660 (c) (1). Employees in Kentucky who complain to their employers about safety and health are protected by KRS 338.121 (3) (a).

Argument

I.

Standard of Review:

When this Court Interprets a Statute It Shall Review the Statute *de novo* and Shall not Defer to the Court of Appeals Interpretation.

When a court reviews an administrative decision involving the interpretation of a statute, it has two duties: to uphold the agency's findings of fact if they are supported by substantial evidence and to conduct a *de novo* review of the law. For this *Estill County* case, a review of the law means an interpretation of the discrimination statute.

In *Kentucky Unemployment Insurance Commission v Landmark Community Newspapers of Kentucky*, Ky, 91 SW3d 575, 578 (2002), this court said, when reviewing an administrative agency's decision, the findings of fact will be upheld even though there exists evidence to the contrary in the record. Then *Landmark* sets down a good definition of substantial evidence:

> Substantial evidence is defined as 'evidence of substance and relative consequence having the fitness to induce conviction in the minds of reasonable [persons].'
>
> At 91 SW3d 579

Of course this *Estill County* dispute is not about the findings of fact. The issue in this case is whether the discrimination statute protects employees who complain to their employers about safety and health in the work place. KRS 338.121 (3) (a).

When this court reviews a case where statutory construction is at issue, it will conduct a *de novo* review according to *Pearce v University of Louisville*, Ky, 448 SW3d 746, 749 (2014), where the court stated:

> Statutory construction is an issue of law that we review *de novo*. Therefore, '[the] trial court's and Court of Appeals construction of statute is also entitled to no deference on appeal... *Cumberland Valley Contractors, Inc v Bell County Coal Corp*, Ky, 238 SW3d 644, 647 (2007)...
>
> (emphasis added)

A starting point for the reviewing court is to determine if "the administrative agency has applied the correct rule of law to the facts so found." *Landmark Community Newspapers* at 91 SW3d 578. If the reviewing court concludes the administrative agency has not applied the correct rule of law, has not correctly interpreted a statute, then the court conducts a *de novo* review of the law. *Pearce, supra*. Franklin circuit[5] performed a *de novo* review of the hearing officer 's recommended order; the court of appeals did not.

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[5] "It is soundly established that the proper interpretation and the ultimate validity of a regulation or statute present issues of law readily reviewable by the circuit court in an administrative appeal." *Baptist Convalescent Center, Inc v Boonespring Transitional Care Center, LLC*, Ky App, 405 SW3d 498, 503 (2013).

II.

The Kentucky Court of Appeals Erred When It Held the Hearing Officer Had No Authority to Interpret the Occupational Safety and Health Discrimination Statute.

In its opinion the court of appeals held our hearing officer impermissibly created a rule, think 1977.9 (c), when he cited to *Chao v Blue Bird Corporation*, US District Court for the Middle District of Georgia, Macon Division (2009), CCH OSHD 32,989, BNA 22 OSHC 1665, in support of his construction of the discrimination statute. Hearing Officer Cobb was not engaging in policy making as the court of appeals suggests; he was interpreting the statute, citing first to this commission's decision for *Terminix, Inc*, D-33-93 (1997), which did not rely on 1977.9 (c) and then to *Blue Bird* which did.

Administrative agencies have a duty to interpret statutes and regulations in an effort to resolve cases coming before them. KRS 338.071 (4) and 803 KAR 50:010 section 3 (1) (ROP 3 (1)). Nevertheless, in *Estill County* the Kentucky Court of Appeals held our review commission had no ability "to use its adjudicatory power to play a policymaking role," citing to *Secretary of Labor v Twentymile Coal Co*, 456 F3d 151, 161 (CADC 2006). In *Twentymile* the DC circuit held the Mine Safety Review Commission had no authority to decide which entity the Secretary could cite, the owner operator or an independent contractor or both, for a violation of a mine safety regulation.

The DC circuit took this position for two reasons: one, the mine act "provides no meaningful standards against which to judge the Secretary's decisions about which party to cite" and so "[T]he Commission is generally without authority to review such decisions."[6] And two, the circuit court held that "Congress did not invest the Commission with the power to make law or policy by other means..." At 161. The court found it was within the Secretary's authority as enforcer of the mine safety law to decide which entity to cite for a violation and its decision was not reviewable by the mine safety commission.[7]

When the DC circuit in *Twentymile* held the Mine Safety Review Commission had no authority to decide who the Secretary of Labor could cite for a mine safety violation, it was not suggesting the mine commission could not decide whether a cited employer had violated a safety standard or a statute; that is what the mine safety commission does. In *Twentymile* the court outlined exactly what the commission could decide:

> the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness.
>
> At 456 F3d 161

Here the court was referring to disputes about mine safety regulations. In *Estill County* now before this court the overriding issue is how to interpret Kentucky's occupational safety and health discrimination statute, KRS

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[6] At 456 F3d 152.

[7] The court stated the Secretary's decision about which entity to cite was "subject to constitutional constraints," meaning review by a court of law. At 456 F3d 161.

338.121 (3) (a). Our hearing officer could not resolve this case without interpreting the discrimination statute as required by our statute and our rules of procedure. KRS 338.121 (3) (a) and ROP 3 (1). This is the purpose of our occupational safety and health review commission. *Twentymile, supra.* Hearing Officer Cobb took the first cut at interpreting the discrimination statute as required by our statute and our rules. KRS 338.071 (4) and ROP 3 (1). Mr. Cobb was not making policy, he was interpreting the statute. Then on administrative review, Franklin circuit took a second, *de novo*, cut, affirming the hearing officer's recommended order and the underlying citation. A court reviewing a decision reached by an administrative agency has a duty to perform a *de novo* review of statutes. *Pearce, supra*, and *Boonespring Transitional Care, supra,* at 405 SW3d 503.

While the majority of cases which come before our review commission[8] are disputes about safety and health regulations,[9] we regularly hear cases alleging violations of two statutes: the general duty clause, KRS 338.031 (1) (a), and the discrimination statute, KRS 338.121 (3) (a). In *Estill County, supra*, our hearing officer, after a trial on the merits, issued findings of fact and conclusions of law. Mr. Cobb concluded Ms. Smith engaged in a protected activity when she complained to the county judge executive about cigarette smoke in her work place. To support his conclusion, our hearing officer

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[8] In *Boyd and Usher Transport v Southern Tank Lines, Inc*, Ky, 320 SW2d 120, 123-124 (1959), this court stated an agency such as the review commission may be a party to an appeal to protect the public interest.

[9] In the industry, these are known as safety and health standards.

interpreted KRS 338.121 (3) (a), citing to the commission's decision for *Terminix International, Inc*, D-33-97 (1999).[10] In *Terminix*, our commission concluded a mother's statement to her son's employer that she was going to call OSHA was a protected activity; at the time, her son was in a hospital receiving treatment for exposure to Dursban, an organophosphate based insecticide.[11] Our *Terminix* hearing officer said he had to "engage in a three step process" to determine if Terminix had discriminated against its employee; the same is true for our hearing officer in *Estill County*.

Hearing Officer Cobb, in his *Estill County* recommended order, then cited to *Blue Bird, supra,* where US District Court Judge Royal did cite to 1977.9 (c)[12] to justify his ruling the employee had engaged in a protected activity when he complained about safety to his direct supervisor. But in his order Judge Royal first held that the statutory phrase "filed any complaint" protected the employee. Then the judge relied on 1977.9 (c) to support his statutory analysis. At 22 OSHC 1667, 1668.

Our hearing officer's *Estill County* recommended order became the commission's final and appealable decision because the commission did not call the case for discretionary review. ROP 3 (1) and ROP 47 (3). Franklin Circuit Court is the first level of appeal from a decision reached by our review commission. Franklin circuit in its opinion performed a *de novo* review of the discrimination statute; Judge Wingate concluded the statute protected

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[10] Our commission maintains an archive of our hearing officers' recommended orders.
[11] Review Commission's decision for *Terminix*, D-33-97, page 13.
[12] The district court cited to 1977.9 (b) but then quoted from 1977.9 (c); so .9 (b) was a typo.

employees who complained about safety and health to their employers. Appendix 3, page 8. In his opinion Judge Wingate cited to *Marshall v Springville Poultry Farm,*[13] *Inc*, 445 F Supp 2, 3 (MD Pa 1977), BNA 5 OSHC 1761.

In his *Springville Poultry* order US District Court Judge Nealon rejected defendant Springville's argument the discrimination act does not apply to the filing of complaints with an employer. Without reference to 1977.9 (c) Judge Nealon stated:

> the construction that defendant advances would be contrary to a normal reading of the statute which requires that the complaint be *under or related* to the Act. Had the drafters of the statute intended to limit section 660 (c) (1) in the manner that defendant suggests, they would have omitted the phrase "under or related to this chapter" and included the words "provided for in the Act" or words of similar import.
>
> Appendix 5, page 1

Then Rudge Nealon, again without relying on 1977.9 (c), said the defendant's argument would violate the rule of the last antecedent which he said "clearly precludes the conclusion that the phrase 'afforded by this chapter' in lines 8 and 9 of 660 (c) (1) modifies and limits the word 'complaint' in line 3." This is because the phrase "afforded by this chapter" does not modify "complaint;" - "qualifying phrases are to be applied only to the words or phrases immediately preceding, and are not to be construed as extending

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[13] In *Kentucky Labor Cabinet v Graham*, Ky, 43 SW3d 247, 253 (2001), CCH OSHD 32,182, the supreme court said because our occupational safety and health law is patterned after the federal act, it "should be interpreted consistently with federal law." *Graham* was abrogated on other grounds by *Hoskins v Maricle*, Ky, 150 SW3d 1 (2004).

to others more remote." Judge Nealon concluded "the only requirement for a complaint under section 660 (c) (1) is that it be 'under or related' to the Act." In other words, the phrase "under or related to the act" is much broader in scope than the limiting phrase "afforded by this chapter." Finally, Judge Nealon cited to 1977.9 (c) to support his independent analysis of 660 (c) (1).

If we could sum up, *Springville Poultry* interprets the federal discrimination statute on its own terms, concluding the statutory language protects employee complaints to their employers about safety and health. Our court of appeals' conclusion that Franklin circuit court relied on 1977.9 (c) as sole justification for its opinion is in error.

We have spent so much time detailing Judge Nealon's order in *Springville Poultry*, cited by Judge Wingate, because the *Springville* order arrives at an analysis of 660 (c) (1)[14] which is independent of 1977.9 (c). Franklin Circuit Judge Wingate in his opinion performed a *de novo* interpretation of the discrimination statute which he was required to do according to Kentucky law on the standard of review of an administrative decision. *Pearce and Boonespring, supra.*

When the Kentucky Court of Appeals in the instant matter stated our hearing officer in his recommended order engaged in policymaking, it was thinking of the hearing officer's cite to Judge Royal's *Blue Bird* order, *supra*, and obviously not to Judge Nealon's order in *Springville Poultry, supra.*

[14] And KRS 338.121 (3) (a).

The court of appeals' duty was to perform a *de novo* interpretation of Kentucky's occupational safety and health discrimination statute and to apply that analysis to the hearing officer's findings of fact which are supported in this case by substantial evidence. *Landmark Community Newspapers, supra.*

A statutory interpretation of KRS 338.121 (3) (a) supports the secretary's citation which concluded Mary Smith engaged in a protected activity when she complained to her employer about smoking in her work place. This interpretation is supported by Kentucky and federal law.

In its *Estill County* opinion the court of appeals asserts employee to employer complaints are "outside the scope of KRS 338.121 (3) (a)" and so Hearing Officer Cobb's cite to *Blue Bird, supra,* was arbitrary. Here, the court of appeals was incorrect; Mr. Cobb was interpreting the statute as did Franklin circuit. The Kentucky Court of Appeals *Estill County* opinion is premised on the notion Kentucky's discrimination statute can neither be interpreted nor enforced without an interpretive regulation. If this is so, and we have demonstrated it is not, then the court's only recourse was to declare it "unconstitutional because it is unintelligible and violates the nondelegation doctrine embodied in Sections 72, 28, 29 and 60 of our Constitution." *Board of Trustees of the Judicial Form Retirement System v Attorney General of the Commonwealth of Kentucky*, Ky, 132 SW3d 770, 787 (2003). Or the court of appeals for *Estill County* could have declared the statute ambiguous and

then performed its own *de novo* interpretation. The court of appeals did neither. In *Springville Poultry, supra,* the US District Court performed an interpretation of the discrimination statute independent of 1977.9 (c) and concluded the statutes protected employees who complained to their employers about issues arising at the work place.

Our court of appeals erred when it declined to perform a *de novo* review of Kentucky OSHA's discrimination standard. At the very least the court of appeals could have discharged its duty by accepting the interpretation provided by Franklin Circuit Court's citation to *Springville Poultry, supra*, or to the contrary provided its own interpretation of the statute.

As we have outlined, an employer's contest of a citation issued by the Cabinet begins with a trial before our hearing officer. After the trial, our hearing officers issue findings of fact and conclusions of law. ROP 3 (1). To make conclusions of law our hearing officers will of necessity interpret regulations[15] for a safety and health case, and the statute at issue for Estill County's discrimination case. Citing to the statute, *Terminix* and *Blue Bird, supra*, the hearing officer concluded Estill County violated the discrimination statute when it declined to call Mary Smith back to work. Hearing Officer Cobb was not making policy, he was interpreting the discrimination statute.

Our court of appeals erred when it simply reversed Franklin circuit and our hearing officer without performing its own *de novo* interpretation of the statute, a task it was required by Kentucky law to perform. *Pearce, supra.*

[15] We call them standards.

The issue framed by Kentucky's discrimination statute is now before this court.

III.

The *Estill County* Opinion Issued by the Court of Appeals Is in Conflict With a Previous Court of Appeals Opinion, *Terminix, supra*, Which Held an Employee's Complaint To His Employer About Safety and Health Was a Protected Activity.

In *Terminix, supra*, an employee was hospitalized for occupational exposure to Dursban, an organophosphate insecticide. Mr. Byers' mother at the trial testified she encountered her son's supervisor at the hospital and told him she was going to call OSHA. The court of appeals in its *Terminix* opinion stated:

> The protected activity, as found by the Commission and the circuit court was the statement made by Brenda Byers, Stephen Byers' mother, to Gary Moss [her son's supervisor] when she allegedly told him she was going to call OSHA... Since Terminix fired Stephen because of the actions of his mother, her actions may be attributed to him. Further, these actions were protected actions. *See* KRS 338.121 [3] [a]. Accordingly, the Secretary of Labor successfully established that Stephen Byers engaged in a protected activity...
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> At 92 SW3d 748 and 749

Our court of appeals in *Terminix* could not have concluded Mrs. Byers' conversation with her son's supervisor was a protected activity without first interpreting the statute to protect an employee's complaint to his supervisor about safety and health matters. If an employee had no such right under the

statute, then any discussion about a mother's conversation with the supervisor would be irrelevant; it was not. The court of appeals in *Terminix* held the son's complaint, lodged by his mother, was a protected activity under Kentucky's OSH discrimination act. KRS 338.121 (3) (a).

Our court of appeals in its *Terminix* opinion cited to three federal cases in support of its decision. In two of the cases, the federal courts interpreted the statute without a reference to 1977.9 (c) which Kentucky has not adopted:

> *Kennard v Louis Zimmer Communications, Inc*, 632 FSupp 635 (ED Pa 1986), and *Donovan v Freeway Construction Co*, 551 FSupp 869 (D RI 1982)

But *Terminix* also cited to *Reich v Hoy Shoe Co, Inc*, 32 F3d 361 (CA8 1994), which while it did not cite to 1977.9 (c) did cite to *Marshall v Springville Poultry Farm, Inc, supra,* which did. *Terminix,* 92 SW3d at 748. As we have explained in our second argument above, the US District Court judge in *Springville Poultry* first performed an independent analysis of the federal discrimination statute, 29 USC 660 (c) (1), finding that an employee complaint to his employer was a protected activity and only then citied to 1977.9 (c) in support of his independent analysis.

We contend the court of appeals in its *Estill County* opinion had a duty to perform a *de novo* interpretation of KRS 338.121 (3) (a). *Pearce, supra.* After its interpretation of the statute, the court of appeals could have either affirmed *Terminix, supra*, or distinguished it or overruled it, stating its reasons. The court of appeals erred when it did neither, declining to cite,

distinguish or overrule *Terminix*. Our court of appeals, in support of an opinion affirming *Terminix*, could have cited to numerous federal cases which have interpreted the occupational safety and health discrimination statute, including *Springville Poultry*. Or, if the court of appeals was troubled by the federal interpretation, 1997.9 (c), and Kentucky's lack thereof, it had a duty to look elsewhere for case law interpreting the federal statute which is a copy of Kentucky's.

At issue for the court of appeals as well as this court for *Terminix* and *Estill County* is whether the phrase "filed any complaint"[16] found in both KRS 338.121 (3) (a) and 29 USC 660 (c) (1) is broad enough to protect an employee who has complained to her employer about a safety and health matter – this was the question facing Mary Smith, Estill County's former employee. Courts have a duty to find the law, even when the parties do not cite to it. "When rendering decisions, courts must apply the governing principles of law, regardless of whether the parties cite them, but not in a mechanical manner." *21 CJS Courts*, section 188, pages 182-183, citing to *City of Memphis v International Brotherhood of Electrical Workers Union, Local 1288*, Tn, 545 SW2d 98 (1976), *United States National Bank of Oregon v Independent Insurance Agents of America, Inc*, 508 US 439, 446, 113 SCt 2173, 2178, 124 LEd2d 402 (1993).

In *16 A Words and Phrases*, we found a reference to the phrase "filed any complaint" and a line of federal fair labor standards act cases which have,

[16] Appendix 6.

independent of any interpretative regulation,[17] held that "filed any complaint" protects employees who lodge wage and hour complaints with their employers. These federal fair labor standards cases, which support our court of appeals opinion for *Terminix, supra*, squarely address the central issue before this court today: whether the phrase "filed any complaint" provides protection to employees, like Mary Smith, who have complained to their employers about safety and health at work. We find these FLSA cases persuasive because the three discrimination statutes, Kentucky's, OSHA's and the FLSA, are identical in so far as their treatment of the "filed any complaint' language. Each statute begins with a reference to the prohibited activity triggered by an employee who has "filed any complaint":

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint...
>
> KRS 338.121 (3) (a) (emphasis added)

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint...
>
> 29 USC 660 (c) (1), the OSHA discrimination act (emphasis added)

> ...it shall be unlawful for any person...to discharge or in any manner discriminate against any employee because such employee has filed any complaint...
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> 29 USC 215 (a) (3), the FLSA discrimination act (emphasis added)

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[17] The fair labor standards act does not have an interpretive regulation for its discrimination statute.

Please refer to appendix 6, page 1, attached to this brief, for the three complete discrimination statutes. Estill County will argue the phrase filed any complaint is directed to complaints filed with the secretary but not to an employer because the word employer does not appear in the statute, any of the three quoted above. But as the fair labor standards cases demonstrate, "filed any complaint" is interpreted to convey a much larger meaning.

Kevin Kasten alleged his employer retaliated against him "based solely on his allegation that he 'filed complaints' with his employers regarding the location of the time clocks," raising a donning and doffing issue. *Kasten v Saint-Gobain Performance Plastics Corp*,[18] 570 F3d 834, 837 (CA7 2009). To begin its interpretation of the statute, the seventh circuit began with the rule that "'the language of the statute itself [and] [a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Sapperstein v Hager*, 188 F3d, 852, 857 (7th Cir 1999)..." "[T]he plain language of the statute indicates that internal, intracompany complaints are protected. The retaliation provision states that it is 'unlawful for any person to discharge...any employee because such employee has filed *any complaint*.'" 570 F3d at 837 – 838.

As Kasten pointed out to the court, "the statute does not limit the types of complaints which will suffice, and in fact modifies the word 'complaint' with the word 'any.' Thus, the language of the statute would seem to include

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[18] Decided on other grounds on appeal to the US Supreme Court. 563 US 1, 131 SCt 1325 (2011).

internal, intra-company complaints as protected activity...The majority of circuit courts considering the question have also found that 'any complaint' includes internal complaints."[19] Then the court lists cases from the fifth circuit, sixth circuit, ninth circuit, first circuit, eleventh circuit and the tenth circuit which have similarly held. Only the fourth circuit has held otherwise. Then the court, affirming the district court, stated:

> Because we conclude, in line with the vast majority of circuit courts to consider this issue, that the plain language of 29 USC 215 (a) (3) includes internal complaints as a protected activity, we affirm the judgment of the district court in this regard.
>
> At 570 F3d 838 (emphasis added)

The court of appeals opinion for *Terminix* and *Estill County, supra*, are in conflict with one another. *Terminix* interprets KRS 338.121 (3) (a) to protect employees who complain to their employers about safety and health. In *Estill County*, however, in an opinion issued some thirteen years after *Terminix*, the court of appeals asserts our hearing officer and Franklin circuit cannot interpret the discrimination statute without an interpretive regulation and then the court improperly declines to conduct its own *de novo* interpretation. *Pearce, supra*. The statutory interpretation found in *Terminix* is supported by *Springville Poultry* and the FLSA line of cases. *Kasten, supra*.

We urge this court to interpret Kentucky's occupational safety and health discrimination statute to protect employees who complain about safety and

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[19] Internal complaints is a code phrase meaning complaints within an organization, here an employee complaining to an employer.

health to their employers and to reverse the court of appeals' *Estill County* opinion, citing to *Terminix, Springville Poultry* and *Kasten, supra.*

IV.

When the Secretary Issued the Estill County Citation, He Was Interpreting the Discrimination Statute. A Citation, Because it is Authorized by Statute, is Legally Superior to an Interpretative Regulation Which in the Federal System Can be Enacted by the Secretary Without Notice and Commend Rulemaking.

In Kentucky, occupational safety and health citations are authorized by KRS 338.141 (1). Each time the secretary issues a citation, he makes policy and interprets the standards and statutes he enforces. *Chevron, USA v Natural Resources Defense Council, Inc*, 467 US 837, 844, 104 SCt 2778, 2782, 81 LEd 2d 694 (1984). In *Chevron*, the US Supreme Court stated:

> 'The power of an administrative agency to administer a congressionally created...program necessarily requires the formulation of policy and the making of rules[20] to fill any gap left, implicitly or explicitly, by Congress.'

Our Kentucky Supreme Court in *Board of Trustees of the Judicial Form Retirement System v Attorney General of the Commonwealth of Kentucky*, Ky, 132 SW3d 770, 787 (2003), said *Chevron* style deference is only granted "when the agency interpretation is in the form of an adopted regulation or formal adjudication." For the case before this court, Estill County's

[20] Of course in Kentucky the standards board writes regulations. But it is the Kentucky secretary who inspects employers and writes citations which are based on a standard for a safety case or the discrimination statute for cases including Estill County.

discrimination citation was a formal adjudication. *Chevron* and *Judicial Form Retirement System, supra.* The Kentucky Secretary of Labor is charged with enforcing the statutes drafted by the General Assembly and found in KRS chapter 338, including the discrimination statute. Labor's secretary chose to interpret the discrimination statute by issuing a citation to Estill County which alleges an employee's complaint to her employer about safety and health was a protected activity. According to *Chevron* and *Judicial Form Retirement System, supra*, the Kentucky secretary's choice to interpret the discrimination statute by issuing a citation is a statutory interpretation permitted by law. *Chevron* and *Judicial Form, supra.* This court may defer to the secretary's interpretation of the discrimination statute, found in the citation issued to Estill County where the secretary determined Ms. Smith's complaint to her employer was a protected activity according to KRS 338.121 (3) (a).

The US Supreme Court stated an occupational safety and health citation, used as a vehicle to interpret a statute, is superior to an interpretive regulation because the issuance of a citation is authorized by law, in Kentucky by KRS 338.141 (1) and in the federal system by 29 USC 658 (a). Here we cite to *Martin v OSHRC and CF&I Steel Corp*, 499 US 144, 156 – 157, 111 SCt 1171, 1179, 113 LEd 2d 117 (1991), CCH OSHD 29,257, page 39,225, BNA 14 OSHC 2097, 2101, where the court stated:

> ...when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress [a statutorily

> authorized citation]...In addition, the Secretary regularly employs less formal means of interpreting regulations prior to issuing a citation. These include the promulgation of interpretive rules.

A federal interpretive regulation is one issued without notice and comment rulemaking.[21]

To recapitulate, the Kentucky secretary of labor interpreted his discrimination statute when he issued to Estill County a citation alleging Mary Smith engaged in a protected activity when she complained about safety to her employer. And the secretary's choice of a citation was a legally superior method of interpretation when compared to an interpretive regulation. *CF&I Steel, supra.* As we have demonstrated above, the discrimination statute is easily interpreted to provide protection to Ms. Smith. *Terminix, Springville Poultry, CF& I Steel* and *Kasten, supra.*

Our court of appeals in Estill County has ventured to say only the standards board in Kentucky is the "exclusive policy-maker..." and "the Board bears sole responsibility for deciding whether an employee-to-employer complaint constitutes a protected activity under KRS 338.121 (3) (a)." At appendix 4, page 7.[22] As we have shown, the Kentucky secretary makes policy every time he issues a citation interpreting the statute. How can it be otherwise?

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[21] 29 CFR 1977.2 states the regulations found in 1977 are interpretive and will stand "unless and until otherwise directed by authoritative decisions of the courts..."

[22] There is no testimony in the record about the standards board. What we have are only its statute and regulation.

An assertion by our court of appeals that the occupational safety and health standards board is the exclusive policy maker does not survive a careful analysis. According to the statute, the secretary inspects places of business for violations. KRS 338.101. He enforces the safety standards and the discrimination statute. KRS 338.031, 338.121 and 338.991. When violations are discovered, the secretary issues citations. KRS 338.141 (1); once an employer has contested a citation, the secretary prosecutes the citation before our review commission. KRS 338.071 (4) and 338.141 (3). As we have described, the issuance of citations is an exercise in policy making and also an interpretation of the cited statute or standard. *Chevron, Judicial Form Retirement System, CF&I, Terminix, Springville Poultry, Kasten, supra.* The standards board, on the other hand, meets but once or twice a year. By statute the secretary of labor sits as its permanent chair. When time is critical, the secretary, the enforcer of the act, may on his own motion adopt a federal safety and health standard. The board has subpoena power and may call witnesses to appear at its hearings. The standards board has no employees; it cannot conduct compliance inspections and does not issue citations. KRS 338.051. The secretary, unlike the standards board, has the statutorily derived ability to learn from experience how to enforce the act because he is continually revising his understanding of the act when he conducts inspections and writes citation. "We noted that 'enforcement of the Act is the sole responsibility of the Secretary.'" *CF&I Steel*,[23] at 499 US 150,

[23] We generally refer to this case as *C F and I Steel* because so many cases are styled either

citing to *Cuyahoga Valley Railway Co v United Transportation Union*, 474 US 3, 106 SCt 286, CCH OSHD 27,413, BNA 12 OSHC 1521 (1985).

Our court of appeals erred when in *Estill County* it stated: "As KOSHA's exclusive policy-maker, the Board bears sole responsibility in deciding whether an employee - to - employer complaint constitutes a protected activity under KRS 338.121 (3) (a)." Kentucky OSHA's discrimination statute may be easily interpreted to provide protection to an employee who complains about safety and health to her employer. The language in the discrimination statute "filed any complaint" protects Ms. Smith. *Terminix, Springville Poultry* and *Kasten, supra.*

V.

Our Hearing Officer Was Not Arbitrarily Engaging in Policy Making When He Cited to *Blue Bird, supra.* But If He Erred, the Error Was Cured By Franklin Circuit Court On Review.

In its standard of review the *Estill County* court of appeals stated "judicial review of administrative agency action focuses on the question of arbitrariness,"[24] citing to *Curd v Kentucky State Board of Licensure for Professional Engineers and Land Surveyors*, Ky, 433 SW3d 291, 303 (2014). On this point the *Curd* court states:

> At the heart of our review of agency decisions is arbitrariness. We inspect the agency's actions to determine 'whether the action was taken in excess of granted powers, whether affected parties

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Martin, a federal secretary of labor, or the *Occupational Safety and Health Review Commission.*

[24] Appendix 4, pages 6 and 8.

> were afforded procedural process, and whether decisions were supported by substantial evidence.'

According to *Curd*, arbitrariness is found when there is a lack of due process or a decision on the facts was not supported by substantial evidence. Or, for the court of appeals' *Estill County* opinion, the agency's actions "were taken in excess of granted powers."

Our court of appeals held our hearing officer's recommended order was arbitrary because he cited to a federal decision which relied, in part, on 29 CFR 1977.9 (c); as we have explained, Kentucky does not have a similar interpretive regulation. The essence of this dispute is whether our hearing officer cited to *Blue Bird, supra,* because he was interpreting the discrimination statute and, perhaps, cited to a case which would not support his interpretation, *Blue Bird,* or whether our hearing officer erred in citing *Blue Bird* because he was arrogating the function of the Kentucky standards board which is empowered to adopt regulations and standards for the occupational safety and health program. According to the court of appeals our hearing officer created a rule when he cited to *Blue Bird*; the court of appeals said, in error, the standards board has the sole authority to interpret Kentucky's occupational safety and health discrimination statute on the issue of employee complaints to their employers. KRS 338.121 (3) (a).

This argument leads to a dead end for the *Estill County* court of appeals opinion and for appellee Estill County Fiscal Court because any legal error allegedly committed by our hearing officer, when interpreting the

discrimination statute, was cured when on review Franklin Circuit Court interpreted the discrimination statute, citing to *Springville Poultry, supra.* This is why our General Assembly directed that decisions issued by our review commission would be subject to judicial review: to cure legal errors, starting with Franklin Circuit Court. KRS 338.091 (1).

Conclusion

The standards board has very little power. While it regularly adopts standards already promulgated by federal OSHA, it is statutorily incapable of enforcing the act. The Kentucky secretary on the other hand enforces the act by conducting inspections of employers and by issuing citations.

The Secretary of Labor makes policy each time he issues a citation interpreting a safety and health standard or the discrimination statute. *Terminix, Springville Poultry, CF& I Steel, Chevron, Judicial Form Retirement System, Cuyahoga* and *Kasten, supra.*

This court has the authority to interpret the phrase "files any complaint" to protect an employee who has complained about safety and health to her employer. *Terminix, Springville Poultry* and *Kasten, supra.*

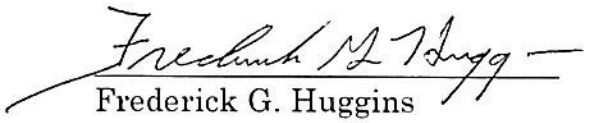
Terminix and *Estill County, supra*, are in conflict with one another. This court can resolve the conflict by reversing the court of appeals' *Estill County* opinion and affirming *Terminix*. This court's reversal of *Estill County* is appropriate because the phrase "filed any complaint," found in the discrimination statute, extends the statute's protection to employees who

have filed safety and health complaints with their employers. *Terminix, Springville Poultry* and *Kasten, supra.*

If the commission's hearing officer erred when he cited to *Blue Bird, supra*, where a US District Court relied on 29 CFR 1977.9 (c) to support its interpretation of the discrimination statute, that alleged error was cured by Franklin Circuit Court when it issued its opinion which was based on *Springville Poultry, supra.* The US District Court for *Springville Poultry* based its interpretation of the discrimination statute on the words of the statute and only then cited to 1977.9 (c) in support of its independent analysis.

Wherefore, the review commission appellant prays for an order of this court reversing the court of appeals opinion in this case and affirming the opinion reached by Franklin Circuit Court. *Terminix, Springville Poultry* and *Kasten, supra.*

Respectfully submitted,



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